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No.

In the Supreme Court of the United States

October Term, 1980

PADUCAH ASSOCIATES, LTD.,
Petitioner,

vs.

INDIANA INSURANCE COMPANY

and

ALL PRIDE DEVELOPMENT CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March 13, 1981

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QUESTIONS PRESENTED

1. Whether arbitrators acting under a binding arbitration clause in a construction contract may, with agreement of the parties, reserve issues from their award, leaving to the parties the right to assert such issues before a Federal District Court independent of the award.

2. Whether a judgment entered by a Federal District Court in an arbitration award confirmation action pursuant to The Federal Arbitration Code is binding upon the parties thereto such that an issue there determined may not be relitigated or form the basis for a conflicting summary judgment in a subsequent action between the same parties on the same subject matter before a second District Court because of the doctrines of *res judicata* and law of the case.

3. Whether a federal District Court may grant summary judgment under Federal Rules of Civil Procedure Rule 56 on the basis of a claim of a contractual waiver of a claim before an arbitration board, when there is a genuine issue of fact that there was no such waiver.

4. Whether summary judgment which results in forfeiture of a claim is the appropriate form of relief under The Federal Arbitration Code with regard to a claim which may be arbitrable under a written arbitration agreement, but which comes before a United States District Court without having been first submitted to arbitration.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Paducah Associates, Ltd., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this proceeding.*

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*The names of all parties to this proceeding below appear in the case caption.

OPINIONS BELOW

The decision of the Court of Appeals, reported at 636 F.2d 1219, appears in full in the Appendix hereto at pages A1 through A2. This decision affirms the decision of the United States District Court for the Western District of Kentucky entered September 12, 1978, which District Court decision has not been reported and appears in the Appendix hereto at pages A3 through A10. This petition also concerns a decision of the United States District Court for the Southern District of Ohio entered March 14, 1977, which decision has not been reported and appears in the Appendix hereto at pages A11 through A27.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 13, 1980. A timely Petition for Rehearing was filed and was denied on December 15, 1980 (Appendix, p. A28), and this petition for a writ of certiorari was filed within ninety (90) days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULE OF CIVIL PROCEDURE INVOLVED

This case involves construction and application of 9 U.S.C. §§3, 9, 10 and 11, portions of the Federal Arbitration Code, and Rule 56, Federal Rules of Civil Procedure.

The full text of the above-cited provisions are printed in the Appendix hereto at pages A29 through A34.

STATEMENT OF THE CASE

This case arises out of a dispute involving a construction contract between Paducah Associates, Ltd., petitioner herein and appellant and plaintiff below (hereinafter called "Paducah") and All Pride Development Corporation, respondent herein and appellee and defendant below (hereafter called "All Pride"). Indiana Insurance Company, respondent herein and appellee and defendant below (hereafter called "Indiana") was surety under a contract bond in which All Pride was principal and Paducah was obligee pursuant to All Pride's contract with Paducah. This dispute has passed through five distinct phases, each of which must be discussed in some detail to provide an adequate understanding of this somewhat complex case.

The Contract and Initial Suit by Paducah

Paducah, a Kentucky Limited Partnership, filed suit on August 19, 1974, in McCracken Circuit Court, McCracken County, Kentucky against All Pride and Indiana, both Indiana corporations. In its pleading, Paducah alleged that it had entered into a contract with All Pride on October 10, 1973, whereby All Pride was to provide the labor and material necessary to perform the on-site construction of a motel in Paducah, Kentucky, in accordance with certain plans and specifications. Paducah further alleged that as a condition of this contract, All Pride secured, from Indiana, a contract bond naming All Pride as principal, Paducah as obligee, and Indiana as surety, which bond was to indemnify Paducah against loss or damage arising by reason of the failure of All Pride to perform the construction contract. Paducah further alleged that All Pride defaulted in performance of the construction contract and that Indiana, as surety, undertook

to provide financial assistance to All Pride and to perform the terms and conditions of the construction contract to completion; but that subsequently, in August of 1974, Indiana discontinued providing financial assistance, abandoned its performance and gave notice to Paducah that it intended to file a mechanic's lien upon the real property which was the site of the motel.

Paducah's initial pleading was a suit to enjoin Indiana from filing a lien upon the construction site real property and a temporary restraining order was granted to Paducah by the State Court. Thereafter, the case was removed by Indiana and All Pride to the United States District Court for the Western District of Kentucky, Paducah Division, with jurisdiction for such removal being based upon diversity of citizenship under 28 U.S.C. §§1332 and 1441. The temporary restraining order expired by its terms and both Indiana and Paducah filed mechanic's liens against Paducah's real property. Paducah filed an Amended Complaint in October, 1974 and a Second Amended Complaint in January, 1975, stating in its first count a complaint of disparagement of its title hindering its ability to obtain financing by reason of the threatened mechanic's liens and in its second count a breach of contract by All Pride under the construction contract and Indiana under the contract bond. The construction contract contained an arbitration clause which was invoked by Indiana and All Pride and, on April 11, 1975, Paducah consented to arbitration.

Proceedings Before Board of Arbitrators

Six days of arbitration hearings were held before a three-member Board of Arbitrators in the Regional Offices of the American Arbitration Association, Cincinnati, Ohio, during September and October, 1975. No transcript of the hearings was made, but a summary of

the hearings was prepared by the attorneys for Paducah based upon their notes, which summary was submitted to the Board of Arbitrators and counsel for Indiana and All Pride prior to the Board's determination. This summary shows that on the fifth hearing day, October 23, 1975, the arbitrators notified the parties that the Board would not consider the issue of slander or disparagement of title in their determination, stating that such question was outside the submission to them as arbitrators (Appendix p. A7). Following this decision, the parties proceeded with arbitration and, honoring the arbitrators' decision, excluded the issue of slander or disparagement of title from any further offers of proof and from the questions briefed before the Board.

The arbitrators entered their award, limiting their determination to the questions of breach of contract which they found in favor of Paducah and against both All Pride and Indiana, specifically finding that Paducah bore no liability for damages as to either All Pride or Indiana. The issue of slander or disparagement of title was expressly excluded from the arbitrators' award in paragraph seven (7) thereof, which stated:

> 7. This award does not determine the right of any of the parties (the owner, contractor and surety) to subrogation or indemnification as to any other person not a party to the arbitration. This award does not determine the rights of any party to damages or any other remedy, legal or equitable, which may have arisen or which may exist outside the arbitration submission and, *specifically, this award does not relate, in any way, to any claim for damages of any sort which may exist by reason of the filing of mechanic's liens by any of the parties to this arbitration.* (Emphasis added; *see* Appendix p. A8).

Confirmation of Arbitration Award

Paducah filed a suit in the United States District Court for the Southern District of Ohio to confirm the arbitration award pursuant to 9 U.S.C. §9, Federal Arbitration Code. Indiana filed a counterclaim seeking modification of Paragraph 7 of the award, alleging that Paducah had been obligated to assert its slander of title claim before the arbitrators and, since Paducah did not rely upon or assert that claim before the arbitrators, the claim had been waived and the award should be modified to bar Paducah from later claiming damages due to slander of title. Both Paducah and Indiana filed motions for summary judgment and, in March, 1977, the District Court handed down its opinion confirming the arbitration award and, at the same time, dismissing Indiana's counterclaim for modification of Paragraph 7.

The District Court held, with regard to Indiana's counterclaim, that on the record before the court there was no evidence that the slander of title claim had ever been submitted to or considered by the arbitration panel and, in fact, the record demonstrated that just the opposite was the case (Appendix p. A23). Moreover, the court noted that it could not determine that the absence of the slander of title issue to the panel was solely the responsibility of Paducah and, therefore, it granted Paducah's motion for summary judgment as to Indiana's counterclaim for modification of the arbitration award (Appendix p. A24).

Proceedings Subsequent to Confirmation

Paducah filed a motion for leave to supplement its complaint in the pending action before the United States District Court for the Western District of Kentucky at approximately the same time it filed its confirmation

action in the United States District Court for the Southern District of Ohio. In March, 1976, Paducah was given leave to file its supplemental complaint. Paducah asserted, in its supplemental complaint, that the arbitration award had not resolved all disputes between the parties, specifically referencing Paragraph 7 of the arbitration award which excluded Paducah's claim for damages which might exist by reason of the filing of mechanic's liens. Further, Paducah alleged, consistent with the arbitration award, that neither Indiana nor All Pride was entitled to any damages against Paducah and that Paducah was entitled to damages from Indiana on account of its having wrongfully, willfully and maliciously filed a mechanic's lien against Paducah's property when it knew that it had no right to do so.

Indiana filed a Motion for Summary Judgment on the grounds that (1) all issues were or could have been submitted to arbitration and the arbitration award barred Paducah's slander of title action on the grounds of the doctrine of *res judicata;* (2) Paducah had waived its claim based on slander of title by failing to assert it in the arbitration proceedings; (3) the action was barred by the applicable statutes of limitation, and (4) Indiana's filing of its notice of mechanic's lien was privileged. Paducah responded to this motion with suggestions in opposition, supported by affidavits and exhibits, asserting that genuine issues of material fact remained for trial.

Initially, in July of 1978, the District Court denied Indiana's Motion for Summary Judgment, finding that there were issues of material fact remaining (Appendix p. A3). However, on September 12, 1978, the Court reversed its earlier decision and sustained Indiana's Motion for Summary Judgment solely on the ground that Paducah had waived its right to pursue the slander of title action

(Appendix p. A9). Concurrently, the Court ruled that Paducah's claim was not barred by *res judicata* as Indiana had asserted (Appendix p. A6), but did not address Indiana's statutes of limitation or privilege claims. Paducah filed a Motion for a New Trial, Amendment of the Court's Judgment or, in the Alternative, for Reconsideration of the Court's Order Sustaining Indiana's Motion for Summary Judgment. Thereafter, the District Court overruled Paducah's Motion and Paducah appealed to the United States Court of Appeals for the Sixth Circuit.

Proceedings Before the Circuit Court of Appeals

Paducah asserted, before the Court of Appeals, that the District Court erred in sustaining Indiana's Motion for Summary Judgment on the basis that Paducah had waived its slander of title claim in that:

1. There was a genuine issue of material fact as to whether the parties had *both* agreed to a limitation or withdrawal of the slander of title issue from arbitration; or

2. It was established beyond doubt, based upon the record before the trial court, including the arbitration award, that either the parties had reserved such issue for trial in the District Court or that *Indiana* had waived its right to demand arbitration of the slander of title issue;

3. In any event, there was a genuine issue of material fact as to whether Paducah had contractually waived its substantive right to damages for slander of title;

4. Summary judgment, a judgment on the merits, was an inappropriate form of relief as Indiana's objection was to the procedure to be followed and not to the validity of Paducah's claim; and

5. The claim of waiver had already been asserted by Indiana in the arbitration award confirmation hearing before the United States District Court for the Southern District of Ohio, had been there determined adversely to Indiana, and therefore was *res judicata* against Indiana as to that issue or, at the very least, Indiana was barred by the doctrine of law of the case.

The Court of Appeals, without addressing the issues raised by Paducah, adopted and affirmed the District Court decision in a one line opinion.

REASONS FOR GRANTING WRIT

1. The Decision of the Court of Appeals for the Sixth Circuit Conflicts With Decisions by Other Circuit Courts Regarding Waiver of Arbitration and Regarding the Power of Arbitrators to Reserve Questions for Subsequent Litigation.

A. The Court below, by adopting Judge Johnstone's District Court Memorandum Order filed September 12, 1978, held that Indiana was entitled to summary judgment as to Paducah's slander of title claim for the stated reason that Paducah had contractually waived its right to assert this claim by not submitting it to arbitration (Appendix p. A1). By so holding, the Court, by necessity, concluded that there was no genuine issue of material fact regarding the slander of title claim remaining for trial and that, as a matter of law, under Federal Rule 56(c), Indiana was entitled to judgment based upon the record before the Court. Basing such a determination upon a conclusion of waiver on the part of Paducah conflicts with the principle established in other Circuits that the question of factual waiver of a right to arbitrate a claim or waiver of a claim subject to arbitration by a party

thereto depends upon the facts of each case and generally calls for a finding by the trier of facts. *Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado,* 614 F.2d 698 (10th Cir. 1980); *Burton-Dixie Corporation v. Timothy McCarthy Construction Co., Inc.,* 436 F.2d 405 (5th Cir. 1971).

Reid Burton Construction Co., Inc., and *Burton-Dixie Corporation* both dealt with construction contract cases wherein the defendants were found by the trier of fact to have factually waived their right to arbitration. In affirming the finding of waiver, both of the Circuit Courts of Appeal held:

> There is no set rule as to what constitutes a waiver or abandonment of the arbitration agreement; the question depends upon the facts of each case and usually calls for a finding by the trier of facts.

(Loc. Cit. 614 F.2d at 702 citing to 436 F.2d at 408).

Paducah, throughout the course of this litigation in the courts below, has vehemently asserted that there remain genuine issues of material fact as to whether or not it has waived its right to assert its slander of title claim against Indiana and there has been no evidentiary finding of a factual waiver by Paducah of such claim. In any event, there remains a genuine issue of material fact as to whether any such waiver occurred, including whether or not this claim was either mutually withheld from submission to the arbitrators by the parties or reserved by the arbitrators for subsequent judicial determination and acceded to by the parties. Clearly, under the *Reid Burton Construction, Inc.* and *Burton-Dixie Corporation* decisions, these would be questions which should be decided by the trier of fact and not as a matter of law under Rule 56(c), Federal Rules of Civil Procedure.

It has often been stated that a summary judgment is not a substitute for a trial of disputed fact issues. *Volunteer Elec. Co-op v. TVA*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd per curiam*, 231 F.2d 446 (6th Cir. 1956). Accordingly, the Court may not try issues of disputed fact under a Rule 56 motion. *Felix v. Young*, 536 F.2d 1126 (6th Cir. 1976). Nonetheless, this is precisely what the trial court has done and the Sixth Circuit has affirmed.

B. The decision by the Sixth Circuit in this case also conflicts with the decision reached in *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962) regarding the question of whether a board of arbitrators may reserve issues from their award and leave the parties free to have the issues so reserved judicially resolved. By holding that Indiana was entitled to summary judgment as to Paducah's slander of title claim, despite the express reservation by the arbitrators of claims for damages arising out of the filing of a mechanic's lien by any party to the arbitration, the Courts below, contrary to the *Lundgren* holding, held that the arbitrators may *not* reserve issues from their award for later judicial determination.

The *Lundgren* case involved a construction contract containing an arbitration clause very similar to that contained in the Paducah-All Pride contract. In that case, claims by the contractor, Lundgren, for unpaid contract balances, losses due to defects in plans and specifications, payment for doing work not called for in the contract and loss of the builder's fee were submitted to arbitration under contract provisions which recited, "All disputes, claims or questions subject to arbitration under this contract shall be submitted to arbitration. . . ." 307 F.2d at 108, n. 2. The arbitrators entered their award, but refused to pass upon claims made by Lundgren for several items, reserving decision as to these claims for the

United States District Court. The District Court subsequently heard and determined these claims and awarded Lundgren an additional amount. The Ninth Circuit, after recognizing the arbitrators' implied authority under a broad arbitration clause to exclude and reserve certain issues from their award (loc. cit. 307 F.2d at 110, n. 6), affirmed the trial court's incremental award to Lundgren. It is important to note that the *Lundgren* court affirmed the trial court's award of additional sums in satisfaction of claims based upon questions reserved by the arbitration panel *even though* the construction contract had provided, as does the contract in the case at bar, that "all disputes, claims or questions subject to arbitration under this contract shall be submitted to arbitration. . . ." Accordingly, the *Lundgren* court recognized (1) the right of arbitrators to reserve questions from their award and (2) the right of parties to have a later judicial determination of those issues. When the Sixth Circuit was presented the identical question regarding arbitrators' reservation of issues, however, it held directly opposite from the *Lundgren* Court on this decisive question, without so much as a word addressing Paducah's argument regarding this issue.

2. The Decision Below Raises a Significant Question Regarding the Application of the Federal Arbitration Code Which Should Be Resolved by This Court.

Paducah submits that Indiana improperly invoked the remedy of summary judgment before the District Court when, at best, it was entitled only to a stay of the proceedings under the Federal Arbitration Code, 9 U.S.C. §3. This section provides the remedy for a party claiming that an issue is referable to arbitration when

that issue has been brought before a court of the United States and provides as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §3.

The courts below have proceeded as though a stay in the proceedings, as mandated in 9 U.S.C. §3, is merely an alternative form of relief to summary judgment and that either may be granted when an issue subject to arbitration is submitted to the court. Paducah urgently asserts that 9 U.S.C. §3 gives the court no such choice, but mandates that the court "shall . . . stay the trial of the action until such arbitration has been had . . ." when confronted with a fact pattern as is presented in this case.

Clearly, Indiana invoked, the trial court granted, and the Circuit Court of Appeals affirmed the wrong remedy if it is accepted that the slander of title issue should have been submitted to arbitration. At best, upon a finding that the slander of title issue was subject to arbitration, the District Court should have stayed the trial and ordered arbitration. Under 9 U.S.C. §3 and the policy favoring arbitration which underlies the Federal Arbitration Code, the court was authorized to do this and

nothing more. Thus, it is for this court to decide whether a District Court may, consistent with the provisions of the Federal Arbitration Code, grant summary judgment, a judgment on the merits, amounting to a forfeiture of a valuable claim, rather than order a stay in the proceedings when presented an issue which is subject to arbitration, but which has not been decided by any court, board of arbitrators or other tribunal.

3. The District Court Below Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision.

The District Court has so far departed from the accepted and usual course of judicial proceedings, and the Circuit Court of Appeals has sanctioned such departure, that Paducah has been denied basic due process of law regarding its slander of title claim and, therefore, the supervisory power of this Court should be exercised. These departures have occurred in a number of areas:

First, the courts below have permitted entry of a summary judgment against Paducah when genuine issues of material fact remained for trial.

Second, the courts below failed to find that Indiana had waived its right to demand arbitration of the slander of title issue by: (1) agreeing to withhold said issue from the submission to the arbitrators; (2) acquiescing in the ruling of the arbitrators that such issue had not been submitted to them and proceeding without objection to such reservation throughout the arbitration; and (3) litigating said issue on the merits before the United States District Court for the Southern District of Ohio.

Third, the courts below based the award of summary judgment on a finding that Paducah had waived its slan-

der of title claim when the question of such waiver had previously been litigated in the District Court for the Southern District of Ohio and should have been barred by the doctrines of *res judicata* and law of the case.

A. The first contention of error, that summary judgment was improperly granted in that there remained genuine issues of fact for trial, has been touched upon above. Paducah has contended throughout the course of this case that it was under no obligation to submit its *tort* claim of slander of title to arbitration under a *contractual* agreement which applied only to disputes *arising under the contract.* Even if it were assumed, however, that such an obligation did exist, Paducah is still entitled to a factual determination as to whether or not the contractual agreement to arbitrate this issue had been waived or modified by the conduct of the parties. The courts below never indicated the manner in which the alleged waiver took place other than to refer to the construction contract provision authorizing arbitration. Clearly the courts have confused the *agreement* to arbitrate with the *submission* of matters to arbitration. It has often been held that parties to a contract providing for arbitration may factually waive the right to arbitrate or may limit or amend matters to be submitted to arbitration. *Reid Burton Construction, Inc., supra; Burton-Dixie Corporation, supra; American Locomotive Co. v. Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950); *Almacenes Fernandez, S.A. v. Golodetz*, 148 F.2d 625 (2d Cir. 1945); *American Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115 (6th Cir. 1948).

The courts below gave weight to an undated "Second Stipulation" in granting summary judgment to Indiana (Appendix p. A7), finding thereon that Paducah had contractually waived its right to pursue its slander of

title claim by submitting all claims to the arbitrators. A closer examination of this stipulation than was made below reveals, however, that it in no way refutes Paducah's contention that there was no waiver of its right to have the slander of title claim heard. This stipulation states that the arbitrators' award would address "all issues, claims, or defenses between the parties which are encompassed in the pleadings . . . pending in the United States District Court for the Western District of Kentucky. . . ." (Appendix p. A7). It is important to note that Paducah's complaint at that time addressed only the issue of Indiana's *threatened* mechanic's lien. Paducah's slander of title action was *not* on file at the time of the arbitration proceedings. It referred to a subsequent course of events which gave rise to that claim *after* the arbitrators had determined that Indiana had no claim against Paducah by reason of the construction contract or bond. Secondly, the stipulation refers to submission of the "claimed rights of Indiana Insurance Company under the mechanic's lien. . . ." (Appendix p. A7). This provision, like the earlier quoted provision does not support the court's conclusion of waiver. This portion of the stipulation, by its terms, refers to *Indiana's* rights under the lien and could not, even by tortured construction, be twisted to refer to Paducah's slander of title claim against Indiana.

Paducah has not had its day in court regarding its slander of title claim and is entitled to be heard. The District Court for the Southern District of Ohio recognized that the arbitrators had expressly excluded this issue from their award and clearly ruled that this issue had *not* been determined by the arbitrators and that Paducah was *not* barred thereafter from asserting its slander of title claim (Appendix pp. A23-24). Accordingly, the *only* question remaining was not *whether* Paducah

could assert its claim against Indiana for slander of title, but *where* such claim should be asserted. By granting Indiana's motion for summary judgment, the courts below have denied Paducah one of the most rudimentary elements of due process, an opportunity to be heard.

B. Paducah contends, as its second assertion of error, that the courts below improperly failed to find that Indiana had waived its right to demand arbitration of the slander of title issue. A party to arbitration may not be heard to complain that a claim is barred because it was not submitted to the arbitrators when the party has acquiesced in the ruling of the board of arbitrators that such claim would not be addressed and has continued without objection throughout the arbitration proceedings. *Cornell & Co. v. Barber & Ross Co.*, 360 F.2d 512, 123 U.S. App. D.C. 378 (1966); *American Locomotive Co. v. Gyro Process Co., supra.* Defects in arbitration proceedings may be waived by a party's acquiescence in the arbitration despite knowledge of the defect. *Order of Railway Conductors and Brakemen v. Clinchfield Railroad Co.*, 407 F.2d 985 (6th Cir. 1969). When no proof is presented to a board of arbitrators in connection with a claim arguably subject to a broad arbitration clause, the parties remain free to litigate such claim in court. *Hannevig v. R. W. J. Sutherland & Co.*, 256 Fed. 445 (2d Cir.), *cert. den.*, 249 U.S. 612 (1919). Moreover, the right to demand arbitration of an issue, or to assert failure to arbitrate as a defense, may be waived by invoking the jurisdiction of a court as to such issue or by participating in the litigation of it. *Reid Burton Construction, Inc., supra.*

It is clear from the record below that Indiana acquiesced in the arbitrators' ruling excluding the slander of title question from the arbitration determination and

continued to participate in the arbitration proceedings without objection. Indiana, throughout the arbitration proceedings presented evidence and made arguments regarding the issues submitted to the board, but remained silent as to any claim that the arbitrators were not properly determining the issues submitted to them. When the question arose as to the propriety of the submission to the board, it was incumbent upon Indiana to raise its concerns before the appropriate court. *Kentucky River Mills v. Jackson,* 206 F.2d 111, 47 A.L.R.2d 1331 (6th Cir.), *cert. den.,* 346 U.S. 887 (1953). Nonetheless, it was not until Paducah filed its motion to confirm the arbitration award in the District Court for the Southern District of Ohio, months after the arbitrators' award was made, that Indiana *for the first time,* argued that the slander of title claim should have been submitted to the board of arbitrators. Moreover, in making such argument, Indiana did not request that the confirmation proceedings be stayed pending arbitration of this issue, but rather joined this issue by way of a counterclaim, invoking the jurisdiction of the court, and litigated it to conclusion with an ultimate resolution in Paducah's favor.

Clearly, Indiana waived its right to assert in the courts below that the slander of title claim should have been arbitrated based on the above-cited cases. Nonetheless, the courts below granted and affirmed a summary judgment in favor of Indiana. If allowed to stand, the decision of the courts below would amount to a sanction of the proposition that a party to arbitration may sit silently by while the board of abritrators proceeds erroneously, only to spring from ambush, claiming failure to arbitrate, months or even years later when the other party seeks to assert its rights. This has not been and should not be the law under facts as are presented here and this Court should exercise its super-

visory power to ensure that this is not the law applied to this case. Justice demands nothing less.

C. Paducah respectfully asserts, as its third contention of error, that the courts below erred in not barring Indiana's claim of waiver on the grounds of the doctrines of *res judicata* and law of the case. An award of a board of arbitrators generally has the effect of a judgment and a judgment entered upon confirmation of such an award is a judgment on the merits. *U.S. Plywood Corp. v. Hudson Lumber Co.*, 127 F. Supp. 489 (S.D. N.Y. 1954). A judgment entered in prior proceedings which overrules a motion to vacate or modify the provisions of an arbitration award is *res judicata* or at least collateral estoppel by judgment as to all issues involving the validity of the award in a subsequent action. *Brown v. Bridgeport Rolling Mills Co.*, 245 F.Supp. 41 (D. Conn. 1965); *James L. Saphier Agency, Inc. v. Green*, 190 F.Supp. 713 (S.D. N.Y.), *aff'd*, 293 F.2d 769 (2d Cir. 1961).

The issue of waiver raised by Indiana in support of its Motion for Summary Judgment was raised by it in its counterclaim to Paducah's confirmation suit before the District Court for the Southern District of Ohio. This counterclaim was a motion to modify the arbitration award and the court, with regard to said counterclaim, granted summary judgment in favor of Paducah and against Indiana (Appendix p. A24). No appeal of this decision was taken and it, therefore, became final. Accordingly, the courts below erroneously permitted Indiana to reassert its claim of waiver when such claim had already been litigated to a final decision adversely to Indiana in the District Court for the Southern District of Ohio and should have been barred by the doctrine of *res judicata*.

Equally applicable to these facts is the doctrine of law of the case. Briefly stated, this doctrine says that if an

appellate body has passed on a legal question and remanded the case for further proceedings, the legal questions so determined will not be differently determined in a subsequent appeal of the case. *United States v. U.S. Smelting, Refining & Mining Co.*, 339 U.S. 186 (1950). In the present case, the appellate body was the United States District Court for the Southern District of Ohio which was authorized to confirm, modify or vacate the arbitration award. 9 U.S.C. §§9, 10, 11. The issue of waiver raised by Indiana in support of its Motion for Summary Judgment below was the same as it raised before that court in support of its Counterclaim. The District Court for the Southern District of Ohio discussed this issue at length in Part II of its opinion (Appendix pp. A22-24) and concluded, as a matter of law: (1) that the arbitrators had specifically excluded the issue of slander of title from their award; (2) that the issue had not been submitted to the board of arbitrators for consideration; (3) that the blame, if any, for not submitting this issue to the arbitrators could not be laid exclusively at the feet of Paducah; (4) that Paducah was not thereafter barred from having its slander of title claim heard; and, therefore, (5) that no modification of the arbitration award would be permitted. Accordingly, the District Court for the Western District of Kentucky, when confronted with the same issues as had already been finally determined by the District Court for the Southern District of Ohio, was bound by the earlier determination and should have denied Indiana's Motion for Summary Judgment. Its failure to do so was plain error in that the court determined the issue of waiver differently than had the District Court for the Southern District of Ohio and, thus, failed to follow the law of the case. As the Circuit Court of Appeals for the Sixth Circuit has sanctioned this failing, it falls to this Court to exercise its supervisory power to correct this error and set right the manifest injustice done thereby to Paducah.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion herein of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

79-3157

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PADUCAH ASSOCIATES, LTD.,
Plaintiff-Appellant,

v.

INDIANA INSURANCE COMPANY and ALL PRIDE DEVELOPMENT CORPORATION,
Defendants-Appellees.

ORDER

(Filed November 13, 1980)

Before: LIVELY and ENGEL, Circuit Judges and PECK, Senior Circuit Judge

Paducah Associates appeals from an order of the district court dismissing its diversity claim of slander of title against defendants Indiana Insurance Company and All Pride Development Corporation. All three parties had entered into a construction contract that contained a broad arbitration clause. A breach of contract dispute arose and the parties agreed to arbitration. Paducah did not pursue its slander of title claim before the arbitration panel. The district court granted summary judgment, finding that Paducah had waived its slander claim by failing to pursue its claim at arbitration.

For the reasons set forth in the memorandum opinion of United States District Judge Edward H. Johnstone, filed in the district court September 12, 1978,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 74-89-P

PADUCAH ASSOCIATES, LTD.,
Plaintiff,

v.

INDIANA INSURANCE CO. and ALL-PRIDE DEVELOPMENT CO.,
Defendants.

MEMORANDUM OPINION

(Entered September 12, 1978)

This slander-of-title action stands before the Court on a motion by Indiana Insurance Company (hereinafter "Indiana") for summary judgment. Previously, we denied the motion because of a then-perceived genuine issue as to a material fact. For the reasons discussed below, the motion is now granted.

The expansive record in this case may be summarized in the following relevant chronology. In 1973 the parties entered into a contract for the construction of a motel in Paducah, Kentucky. The plaintiff, Paducah Associates (hereinafter "Paducah"), was the owner of the motel. All-Pride Development Company, the contractor, was to perform the actual construction, with Indiana acting as the surety. Included in the agreement was a broad arbitration clause:

> All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach

> thereof . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining, unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Sometime after work commenced, disputes arose among the parties as to their performance and obligations under the contract. When efforts to resolve the differences proved unsuccessful, Paducah brought suit in McCracken Circuit Court alleging various contract breaches and also seeking equitable relief against the threatened filing of a mechanic's lien by All-Pride and Indiana on the subject property of the contract. The state court issued a restraining order against the filing of the lien.

The defendants then removed the action to this Court and, after the restraining order expired, filed a mechanic's lien statement against the plaintiff's property on September 20, 1974. Following Paducah's second amended complaint and Indiana's invocation of the arbitration clause, the parties agreed to arbitrate their disputes, despite Paducah's initial objections. The arbitrators entered an award for the contract claims on December 24, 1975, but they did not address the mechanic's lien issue. The award was confirmed by the United States District Court for the Southern District of Ohio.

The defendants released the mechanic's lien on January 26, 1976. Paducah then filed a supplemental complaint in this Court on March 12, 1976, seeking damages for slander of title arising from the mechanic's lien. There followed Indiana's present motion for summary judgment.

Indiana relies on three arguments to support its motion: (1) the slander-of-title claim is barred by the statute of limitations; (2) the filing of the mechanic's lien was privileged; and (3) the slander-of-title claim is barred by the principles of *res judicata* or waiver. We shall confine our discussion to the third argument.

Indiana contends that Paducah had an opportunity to submit its slander-of-title claim to the arbitrators. Having failed to do so, it is barred by the principles of *res judicata* from now asserting that claim in this Court. Despite an earlier ambiguity on this point, the parties now agree that the slander-of-title claim was never submitted to the arbitrators for decision.

We conclude that the doctrine of *res judicata* does not apply to these facts. Generally, the doctrine precludes relitigating not only those matters which were actually involved in a prior proceeding but also those that might have been presented. *Mayer v. Distel Tool & Machine Co.*, 556 F.2d 798 (6th Cir. 1977); *Coogan v. Cincinnati Bar Association,* 431 F.2d 1209 (6th Cir. 1970). It has been held that the doctrine applies to arbitration proceedings. *Bower v. Eastern Airlines, Inc.*, 214 F.2d 623 (3rd Cir. 1954); *Overseas Motors Inc. v. Import Motors Limited, Inc.*, 375 F.Supp. 499 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir. 1975), *cert. denied,* 423 U.S. 987, 96 S.Ct. 395 (1975).

However, an important distinction must be made. *Res judicata* bars a party from retrying the same *cause of action,* even if he has neglected to present all possible issues or theories of recovery. But a party may still litigate an entirely separate cause of action. Thus, the central issue is the meaning of a "cause of action." Three principal definitions have been cited. F. James, *Civil Procedure* 553-554 (1965). Under the narrowest definition a cause of action is a single remedial right. Consequently, a single

injury might give rise to several successive suits based on different theories of recovery. A broader, more modern definition is a single breach of a primary duty. Under this test, one occurrence might give rise to several causes of action but only for independent breaches of duty, not merely different theories of recovery. The third definition is cast in terms of factual unity:

> The narrowest version of this view would require that the same evidence support both actions. A broader version, however, would not require identity of evidence but would define "cause of action" broadly to include the group of operative facts pragmatically determined by the court as those which should be treated as a unit . . . *Id.* at 554.

Even under this broad definition, we think that Paducah's contract cause of action is distinct from its slander-of-title claim. Factually, the two claims might be supported by some common evidence, and certainly the filing of the mechanic's lien was a contract-related act. "However, the mere fact that the two actions relate to the same subject matter does not necessarily establish that they are on the same cause of action." 46 *Am. Jur. 2d* Judgments §407 (1969). As to the two actions under discussion, there is a factual relationship but not factual unity. Surely, a plaintiff might wish to join both claims in the same suit, but permissive joinder is not the test. The mechanic's lien was not filed until disagreements over the contract arose. Whatever claim for damages this may have given Paducah did not depend solely on the underlying contract disputes. We do not find the requisite factual coherence so as to apply the rule of *res judicata.*

We do conclude, however, that Paducah has waived its right to pursue its slander-of-title action in this court. As noted earlier, the arbitration clause required that all

claims relating to the contract be submitted to arbitration. When Indiana invoked that clause, the parties arranged for arbitration proceedings. In the record there is an undated "Second Stipulation" stating that all claims and disputes had been submitted to the arbitrators:

> The parties hereby agree that all issues between them have been submitted to arbitration including . . . any and all issues, claims, or defenses between the parties which are encompassed in the pleadings in the case of Paducah Associates, Ltd., Plaintiff, vs. Indiana Insurance Company and All-Pride Development Company, Defendants, pending in the United States District Court for the Western District of Kentucky . . . and the claimed rights of Indiana Insurance Company under the Mechanic's Lien claim filed in the Office of the McCracken County Clerk, Paducah, McCracken County, Kentucky, dated September 20, 1974.

Paducah had never asserted a slander-of-title claim by that name in the pleadings prior to arbitration, though it had sought equitable relief against the filing of the lien. Yet a summary transcript of the arbitration hearing demonstrates that slander of title had emerged as a possible issue for consideration:

> Hardy (arbitrator): Submission does not include any damages arising from the filing of the mechanic's lien claim.
>
> Hardy says slander of title question not before arbitrators, i.e., whether not in good faith and known not to be in good faith. (Arbitration transcript, p. 48)

Thus, on the one hand the parties had stipulated that all issues had been submitted to arbitration, but it is undisputed that the slander-of-title claim was not presented by Paducah, even though it was a live dispute. Paragraph 7 of the Award of the Arbitrators bears out this point:

> This award does not determine the rights of any party to damages or to any other remedy, legal or equitable, which may have arisen or which may exist outside the arbitration submission and, specifically, this award does not relate, in any way, to any claim for damages of any sort which may exist by reason of the filing of mechanic's liens by any of the parties to this arbitration.

Given that state of affairs, we hold that Paducah has contractually waived its right to bring the present action. Both parties have cited the case, *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962), to support their positions. In that case, Lundgren, a builder, had contracted with a school district to build various structures and facilities. Prior to completion, the school district terminated the contract upon the advice of architects. Lundgren then sued the school district for unpaid balances and joined a claim against the architects for interference with his performance of the contract and for other damages, including damage to reputation and credit. His claim against the school district was submitted to arbitration pursuant to an arbitration clause similar to the present one. The eventual arbitration award was confirmed by the district court, and later the court ruled that no issue remained between Lundgren and the school district. On appeal, Lundgren argued that further issues did remain because he had sustained special damages such as loss of reputation and loss of credit standing. The court held that the arbitration award barred further proceedings: "The short answer to this contention is that Lundgren never claimed such damages in his complaint against school district. The stipulation was to arbitrate 'the issues between the parties.'" *Lundgren v. Freeman, supra* at 115. Whatever the factual differences between that case and the instant one, *Lundgren* can fairly be cited for the prop-

osition that a contractual stipulation to arbitrate all issues bars the later presentation of new claims.

Paducah, however, cites *Lundgren* for another facet of the case. The court held that Lundgren could maintain an action against the *architects* for damages arising from acts that exceeded their authority as agents for the school district. But Lundgren's suit against the architects was never submitted to arbitration in the first place. Furthermore, the court stated that "insofar as architects acted as agents or quasi-arbitrators, Lundgren has elected his remedy and cannot now recover from them any of the damages passed upon by the arbitrators, whether allowed or disallowed by them." *Lundgren v. Freeman, supra* at 119. Consequently, this holding does little to advance Paducah's argument.

CONCLUSION

Broad arbitration agreements manifest a desire to arbitrate disputes rather than resort to the courts. *Georgia Power Co. v. Cimarron Coal Corp.*, 526 F.2d 101 (6th Cir. 1975), *cert. denied*, 425 U.S. 952, 96 S.Ct. 1727 (1976). Paducah had the opportunity to press its slander-of-title claim before the arbitrators. In light of its failure to exercise that right, coupled with the signed stipulation that all issues had been submitted to arbitration, we hold that Paducah has waived its right to seek judicial determination of that claim.

Accordingly, the motion of the defendant, Indiana Insurance Company, for summary judgment is granted. A separate order is this day entered.

DATED: September 6, 1978.

/s/ Edward H. Johnstone
Edward H. Johnstone
Judge, United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 74-89-P

PADUCAH ASSOCIATES, LTD.,
Plaintiff,

v.

INDIANA INSURANCE CO., and ALL-PRIDE DEVELOPMENT CO.,
Defendants.

ORDER AND JUDGMENT

(Entered September 12, 1978)

The defendant, Indiana Insurance Company, having moved the Court for summary judgment, and the Court having entered its memorandum opinion and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that the defendant's motion be, and it is hereby SUSTAINED.

This is a final and appealable judgment and there is no just cause for delay.

DATED: September 6, 1978.

/s/ Edward H. Johnstone
Edward H. Johnstone
Judge, United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-76-47

PADUCAH ASSOCIATES, LIMITED
Plaintiff,

vs.

INDIANA INSURANCE COMPANY

and

ALL PRIDE DEVELOPMENT CORPORATION,
Defendants.

DISPOSITION OF PENDING MOTIONS FOR SUMMARY JUDGMENT

(Filed March 14, 1977)

This was once a relatively simple action to confirm an arbitration award pursuant to 9 U.S.C. § 9. The defendant Indiana Insurance Company then filed a counterclaim seeking modification of the award of the Arbitrators with reference to possible subsequent claims by the plaintiff against the defendant. The plaintiff thereafter amended its complaint to seek modification of the actual amount awarded by the arbitrators to the plaintiff. The cause is now before the Court upon cross-motions for summary judgment.

* * * * * * *

A discussion of the factual and procedural events of this case is necessary before one may come to grips with the muddled legal issues.

In October of 1973 the plaintiff Paducah Associates (Paducah) contracted with All-Pride Development Corporation (All-Pride) for a motel construction project. The defendant Indiana Insurance Company (Indiana) executed a performance bond at approximately the same time. In May of 1974 All-Pride developed financial difficulties and requested assistance from Indiana Insurance. Indiana paid subcontractors and All-Pride payroll employees until August of 1974, when it ceased all payments.

On August 19, 1974, the plaintiff filed suit against All-Pride and Indiana in McCracken Circuit Court, McCracken County, Kentucky. That action was removed to the United States District Court for the Western District of Kentucky. The defendant Indiana then invoked the mandatory arbitration clause of the bond contract, and a number of issues were submitted to the arbitrators. The arbitration panel conducted five days of hearings - September 16-18 and October 22-23 of 1975.

On October 17, 1975, after the September arbitration hearings, but before the October hearings, subcontractors holding mechanic's liens on the Paducah/All-Pride project filed suits in McCracken Circuit Court to enforce those liens against Paducah and Indiana Insurance in an action styled *Cole Lumber and Supply Co., Inc. v. McBride*, Civil No. 14,876. The lienholders sought to enforce their claims against property held by Paducah and against the bond given by Indiana to Paducah.[1] There is still a dispute between Paducah and Indiana as to whether the arbitration panel considered the liens of all the subcontractors in making its award, an issue discussed *infra*.

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1. In Kentucky a subcontractor may, in certain circumstances, directly sue a surety on a bond to which it is not a party, but to which it is a third-party beneficiary.

On December 24, 1975, the arbitration panel issued an award of damages in favor of Paducah and against Indiana in the amount of $159,842.12, plus interest of approximately $12,000. The amount due by the surety Indiana to Paducah was computed by deducting credits paid by the surety to All-Pride's subcontractors during May-August, 1974 ($165,000) from the total amount of the bond, *i.e.* $325,000. While the focal issue in the arbitration was whether or not the surety's liability was limited to the original amount of the bond, the plaintiff now apparently challenges not only the determination that Indiana's liability was limited to $325,000, but also the allowance of the credits for the funds advanced to All-Pride's subcontractors in May-August of 1974.

On January 26, 1976, Indiana, rather than paying the amount of the award directly to Paducah, interpled $173,755 into the *Cole Lumber and Supply* action in McCracken Circuit Court. In interpleading that amount the defendant Indiana claimed the sum represented the total liability which it had on the bond as determined by the arbitration panel, a position which it continues to assert in this action.

This action was filed by the plaintiff on February 3, 1976, asking for confirmation of the arbitration award and the entry of a judgment on the award amount declared due to it by Indiana in the arbitration award. The primary purpose of such a motion for confirmation and judgment would be to establish whether the defendant Indiana had discharged its liability as set forth in an arbitration award by interpleading the amount of the award rather than tendering it directly to Paducah.

The defendant Indiana answered the complaint in this action on February 25, 1976 by stating, *inter alia*, that it had interpleaded the amount into the McCracken County

Court in the *Cole Lumber* suit. The defendant also counter-claimed, asking for a modification of the arbitration award to reflect the consideration and disposition of any possible slander of title action by the plaintiff Paducah against it.

On June 7, 1976, the plaintiff and defendant, together with most, if not all, of the individual subcontractor-lienholders in the McCracken County suit, entered into a stipulation which permitted the interpleaded funds to be drawn down by Paducah Associates. The drawn-down funds were thereafter to be paid at a rate of 75 cents on each dollar of claimed debt to the individual subcontractor-lienholders, who would then release their liens upon the real property of Paducah. The stipulation provided in relevant part:

> 1. Defendant, Indiana . . . has filed a counter-claim and cross-claim interpleader . . . and on January 26, 1976 deposited . . . the sum of $173,755.00 *alleging that this fund represents the full extent of its liability and a contract bond* which it executed on behalf of All-Pride Development Corporation as determined by an award in arbitration between Paducah . . . and Indiana . . . and All-Pride. . . .
>
> 2. That Thomas Vernier, Receiver for the defendant, Paducah . . . has moved to be substituted as party-defendant for Paducah . . . in this cause and *claims the entire amount of the deposit in . . . the Court as the property of the defendant Paducah . . . as the award in arbitration.*
>
> . . . .
>
> 10. That, except as stipulated . . . all the parties hereto reserve their claims, rights, causes of action and defenses as asserted in the pleadings in this cause.

> 11. That the plaintiffs and defendants . . . stipulate with the defendant Thomas Vernier, that upon final determination of their claims against Indiana . . . under the . . . bond, from any amount assessed in their favor against Indiana . . . the unpaid principal balance of their respective claims shall first be paid to them and the remainder of such award shall be paid to the defendant Thomas Vernier as Receiver of Paducah . . .

Based on that stipulation, the McCracken County Court issued an order approving the draw-down by Vernier as Receiver for Paducah,[2] and the distribution of those funds to the named creditors. The Order does not adjudge the limits of Indiana's liability, and specifically reserves the claims and defenses asserted to all parties, notwithstanding the draw-down and distribution. Indiana is specifically held to have no objection to distribution prior to the determination of liability, since it was liable for at least the amount interpled to the claimants, ¶ 9, *Cole Lumber & Supply Co., Inc. v. McBride,* Order of June 7, 1976, Civil Action No. 14,876 (McCracken, Kentucky, Circuit Court, Division No. I).

There appears to be no dispute that the interpled fund was drawn down by Paducah's receiver and paid out to the creditors, who thereafter released their liens against Paducah's real property.

On July 7, 1976, five months after the date of the original complaint and six and one-half months after the arbitration award was issued, the plaintiff moved for leave to amend its complaint to include a petition for

---

2. The Court notes that Paducah was, and still is, in receivership, yet the receiver is not a party to this action. Since the defendant has not sought to raise the issue, the Court need not decide whether the proper party in interest is before it.

modification, correction or vacation of the arbitration award. An order granting leave was issued on September 29, 1976.

This Court is now asked to consider and act upon three issues. First, should the arbitration award be modified as to the damages which were awarded to Paducah. Second, should the award be modified to reflect the disposition of certain claims for disparagement of title apparently raised by the plaintiff against the defendant in another court and action other than the present one. Third, was the impleader of the award amount by the defendant Indiana proper satisfaction of the arbitration award to the plaintiff.

I. The Arbitration Award: Damages

The plaintiff has asked this Court to amend - or vacate - that part of the arbitration award which credited Indiana with the amounts which it had paid to subcontractors of All-Pride from May to August of 1974. The plaintiff also apparently challenges the arbitration panel's limitation of Indiana's liability to the amount of the bond, contending that under applicable law, if the defendant surety had undertaken the performance of the contract, its liability was not limited to the amount of the bond.

The power of this Court to modify or vacate the arbitration award in question is governed by 9 U.S.C. §§ 10 and 11.

Modification or correction of an award under § 11 is limited to three circumstances, only one of which is relevant to the plaintiff's claim. Under § 11(a) an evident material miscalculation may be corrected by the Court, as may an evident material mistake in the description of any person, thing, or property. In the present case the plaintiff's challenge to the amount awarded by the arbitration panel is not based upon any miscalculation, evident

or otherwise, except to the extent that the plaintiff alleges that the computations were not consistent with either the law or the panel's own findings. Put another way, given the premise the various credits could be allowed and the various interest penalties assessed in the manner set forth by the panel, the calculations are at least mathematically correct. To that extent, there is no basis for modification or correction under § 11, at least so far as the plaintiff's claims are concerned.

Title 9 U.S.C. § 10 provides for the vacation of an arbitration award in a number of circumstances, one of which is applicable to the plaintiff's claims. Section 10(d) provides that where arbitrators exceed their powers, or so imperfectly execute them that a material, final and definite award upon the subject matter submitted was not made, the Court may vacate it. In the particular context of arbitrations which are challenged because the arbitrators erred as to findings of fact or law, the general rule is that mere errors on the part of an arbitrator will not support the Court's vacation of an award, *Wilko v. Swan*, 346 U.S. 427, 436-437 (1953); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2nd Cir., 1972). Put another way, only manifest disregard for the law or a lack of fundamental rationality will be grounds for vacating an award, *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125, *1131* (3rd Cir. 1972) (fundamental rationality); *Bell Aerospace Co., Division of Textron, Inc. v. Local 516, Int. Union, United Auto, Aerospace & Agri. Implement Workers*, 356 F.Supp. 354, 356 (S.D. N.Y., 1973), aff'd in part, rev'd in part 500 F.2d 921 (2nd Cir. 1974).

Both parties have submitted to this Court extensive exhibits concerning the facts and law submitted to the arbitration panel and provided more than ample comment upon the allegations of (in)consistency of the award and the law; the knowledge of the arbitrators; and the legal

principles applicable to the parties and the bond contract in this action. The Court must, however, make the award itself as the focal point of any consideration of a motion to vacate.

The award states that, pursuant to the contractor's (All-Pride's) request, the surety (Indiana) extended financial assistance to the contractor, which was in default (¶ 4), but that the agreement did not constitute an election by Indiana to perform the remainder of the contract (¶ 8) and that there was no intention by the surety or the contractor that the surety waive the maximum obligation of its bond ($325,000). The award also states that the surety is entitled to no damages against the owner (Paducah), either by way of set off, assignment or subrogation (¶ 13).

Those findings by the arbitration panel are, after examining the applicable law as cited both to the arbitrators and the Court, not only fundamentally rational, but also appear to be correct as a matter of law. At any rate, the Court finds no manifest disregard for the law in that part of the award, and it will not be vacated or modified. The total liability of Indiana is $325,000.

The crux of the plaintiff's claim is that, assuming the surety did not undertake to perform the contract, thereby limiting its liability to the bond of $325,000, Indiana's liability cannot be reduced by the $165,157.88 paid out on behalf of All-Pride in the face of the finding in Award ¶ 13, i.e., that the surety is entitled to no damages against the owner by way of set-off, assignment or subrogation.

First, it is not clear to the Court from these pleadings whether, as a matter of law, the amounts paid by a surety to a contractor to keep such a contractor "afloat" before undertaking performance of the contract can legitimately be credited against ultimate liability on the amount of

the bond. It is not clear, therefore, whether the arbitration panel ruled correctly as a matter of law. That point is not, as previously noted, controlling in the consideration of a motion to vacate or modify.

Secondly, and more to the point, it is not clear that the arbitration panel knew the law and proceeded to disregard it. The plaintiff's position is that the parties both agreed that the panel could go one of *two* ways. The panel could find that the surety had undertaken performance, waiving the limits of the bond. In such a situation, the surety could naturally claim the payments it made on behalf of All-Pride, but would be liable for a much larger total amount. The plaintiff contends that the only other option available to the panel was to find that the plaintiff has not undertaken to perform the contract, had not waived the amount of the bond as the limit of its liability, and consequently was liable for the amount of the bond, $325,000. So far, all the parties are in agreement.

The plaintiff next argues that if the defendant surety did not elect to perform, it must pay the entire amount of the bond, *regardless* of any amounts already advanced to the contractor All-Pride. Put another way, the plaintiff contends that the arbitration panel could not deduct the $165,000 advanced by Indiana to the subcontractors "for the benefit of the owner" in 1974; that both parties agreed that it was the law that such credits could not be deducted; and that the panel knew that such credits could not be deducted. The plaintiff cites to ¶ 13 of the award, which declares that the surety had no right of damages against the owner (Paducah), "either directly or by way of set-off, assignment or subrogation," as evidence that the panel knew it had only one of two choices in computing the award. The plaintiff concludes that the award of the $165,000 credit is in manifest disregard of the law as the

arbitration panel knew it. *See* Post-Hearing Memorandum Brief of Paducah Associates, Ltd. at p. 16 (Exhibits attached to Second Affidavit of Alan H. Lobley, Docket No. 25).

Were the plaintiff correct in its assertion that both parties agreed both to the law as it applied to the credits claimed by Indiana and that the arbitration panel knew that it could compute damages in relation to those credits in only one of two ways, this Court might then be required to examine the "fundamental rationality" of the award and determine whether the arbitration panel manifestly disregarded the law.

An examination of the submissions to the arbitration panel reveals, however, that Indiana had consistently argued for a third method of computing its remaining liability to Paducah. The pre-hearing brief of Indiana Insurance Company (Exhibit 2 attached to Second Affidavit of Alan H. Lobley, Docket No. 25), at page 2, claims from the very outset that it was released from liability to the owner to the extent of the $160,000 it had already paid under the bond. Indiana also argues, at page 8 of that same brief, that such payments were made pursuant to the contractual provisions of the bond. It is clear beyond question that the surety was contending at arbitration (1) that its total liability was limited to $325,000, the amount of the bond, and (2) that its liability to Paducah was to be reduced by the amount already advanced under the bond provisions.

Whether Indiana was correct as a matter of law is a question which this Court need not consider. It is sufficient for purposes of review under 9 U.S.C. § 10 that the arbitration panel was faced with three different legal theories of recovery and chose one. Whether correct or not, there was no "manifest disregard for the law." The

Court further specifically finds that the award manifests a fundamental rationality. Without attempting to decipher the law of suretyship, it appears to this Court that payments made by the surety on behalf of the owner may be deducted from the amount of a bond in determining the net amount owing by the surety to the assured.

The plaintiff's arguments with respect to the alleged inconsistency between ¶ 13 of the findings and the award are not persuasive. The disallowance of *damages* for Indiana as against the owner Paducah is consistent with the crediting of payments made by the surety on behalf of Paducah. Indiana had advanced at arbitration items of damages against Paducah separate and distinct from the claim that it had already advanced amounts under the bond to subcontractors. Those claims for damages related, at least in part, to the alleged breaches of contract by the owner Paducah discussed and ruled on in favor of Paducah in paragraphs 5 and 6 of the Award findings.

The findings and award of the arbitration panel will not be disturbed as to the credits of funds previously advanced by Indiana for the benefit of Paducah in computing the net liability of Indiana to Paducah.

II. *Defendant's Counterclaim for Modification or Correction of the Award*

The plaintiff has moved for summary judgment as to the defendant's motion to modify the wording of the award. The plaintiff's counterclaim recites that Paducah was required under the terms of the bond to submit all of its claims to arbitration; that Paducah submitted a claim to the arbitration panel; that it did not rely upon or assert any claim for slander of title to the arbitrators and that the arbitration award is "in error" to the extent that it does not reflect the submitted stipulation of the parties

that all claims and other questions between the parties arising out of the contract or the breach thereof were to be submitted to that arbitration.

The defendant seeks to incorporate additional language into the order reflecting the arbitration panel's disposition of only certain issues - as opposed to all claims arising in this dispute - because Paducah did not assert such claims.

The plaintiff's motion for summary judgment is based in part upon the assertion that not only did the parties not submit the issue of slander of title to the arbitration panel, but that the defendant apparently admitted that the slander of title issue had been specifically excluded by the arbitrators at the hearings. The plaintiff also proffered the exhibits attached to the plaintiff's amended complaint herein as evidence that the slander of title issue had not been submitted by either party.

The defendant has replied that it expressly denied the plaintiff's request for an admission that the arbitration panel had ruled the slander of title issue to be outside of the submissions of either party, and concluded that there are no facts before the Court upon which to predicate a summary judgment.

The state of the pleadings on this issue are particularly muddled. The Court will attempt to unravel, without breaking, the threads of issues, arguments and exhibits.

FIRST, it is axiomatic under Rule 56 that there must be no issues of material fact and the moving party must be entitled to judgment as a matter of law.

SECOND, the party opposing the motion may not rest upon its pleadings as to fact issues, and must come forward with affidavits or other appropriate submissions if it wishes to demonstrate that issues of fact remain, Rule

56(e), F.R.Civ.P., *Williams v. B. & O. R. Co.*, 303 F.2d 323, 324 (6th Cir., 1962); *see generally* 10 Wright & Miller *Federal Practice and Procedure* § 2739.

One of the alleged "fact issues" relevant to this motion is the alleged admission by the defendant of "Plaintiff's First Request for Admissions herein, Item #2, Second Summary, pages 37 and 48." Neither the request nor the admission (or denial) are before this Court.[3] The Court cannot, therefore, consider the allegations that the defendant either admitted or denied, in a request for admisssions, the fact that the panel had specifically excluded the slander of title issue from consideration. That determination is without prejudice to the relevancy - if any - of the fact that the arbitration panel did or did not so state that it was not deciding the slander of title issue at the hearing.

What is before the Court is verified evidence of the submissions by the parties to the arbitrators; the undated second stipulation of the parties to the arbitrators (Exhibit 11 to the second affidavit of Alan H. Lobley, Docket No. 25); the previously-stated undisputed chronology of the mechanic's lienholder suits, which were filed after the first arbitration hearing had been completed; and the statement of the arbitration award specifically excluding the slander of title issue from its consideration (¶ 7). The Court concludes that, on the present record, there is no evidence that the slander of title issue was presented to the arbitration panel, or that they considered it. The record demonstrates that just the opposite occurred. Given that undisputed state of facts, the defendant cannot suc-

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3. On the off chance that either or both of these items are buried within the mass of documents provided by the parties, it may be noted that no identification or citation to an exhibit has been provided to the Court.

cessfully maintain that the arbitration award ¶ 7 is manifestly in disregard of the law or that it lacks fundamental rationality.

It appears, furthermore, that there is no evidence at this time as to where, when or even if the slander of title issue has ever been raised. It certainly is not clear from these pleadings that any slander of title action had ever commenced in any Court, let alone by the time issues were to have been submitted to the arbitration panel. If such an action did exist before the arbitration commenced, this Court could not, on this record, lay the blame, if any, exclusively at the feet of Paducah. Claims by subcontractors other than those submitted by either Paducah or Indiana to the arbitration panel apparently escaped detection prior to the filing of the *Cole Lumber* suit in McCracken County on October 17, 1975.

To conclude, there is no evidence of a "manifest disregard of law" or of any lack of fundamental rationality in the arbitration award's treatment of possible claims for damages arising from mechanic's lien as set forth in ¶ 7 of the award, and no modification (under § 11) or vacation (under § 10) may be awarded as to the counterclaim of the defendant Indiana. Summary judgment will be granted to the plaintiff as to the defendant's counterclaim, and the counterclaim will be dismissed.

III. Discharge of Arbitration Award

This Court is in a peculiar position in relation to the request of Paducah to confirm the arbitration award and to enter a judgment thereon. The Court has no problem with a confirmation consistent with the preceding parts of this opinion, nor any reluctance in entering a judgment thereon. The crux of the problem is determining whether the drawing-down of the interpleaded funds in the *Cole*

Lumber case constitutes a discharge of - or at least a credit towards - the amount due.

A review of the current status of the impleaded funds reveals the following facts:

1. Indiana has interpleaded the amount of the award plus the interest due up to and including the date of interpleader.

2. Indiana claims that the amount interpleaded into Court is the entire amount owing under the bond as fixed by the arbitration.

3. Paducah claims the entire amount of the interpled funds is owing to it under the arbitration award.

4. Paducah, Indiana and the lien creditors have stipulated to the distribution of the interpled funds without prejudice to the rights of the parties to finally adjudicate claims in the suit (except that the lien creditors were to release their liens upon Paducah real property).

5. Paducah has, pursuant to Court order based on the stipulation, drawn down the interpled funds and distributed them to the lien creditors.

6. The McCracken County Court has not determined whether Indiana is liable to the subcontractors as third-party beneficiaries to the bond beyond and aside from any arbitration determination as between Paducah and Indiana.

7. The McCracken Court has not determined whether the entire amount of the interpled funds is due to Paducah.

One other important fact enters into this determinaiton: The asserted third-party beneficiaries of the bond,

i.e., the Kentucky subcontractors of All-Pride, were not parties to the arbitration now being considered by this Court. Given this set of facts, it cannot be said whether or not Indiana has discharged its obligation under the arbitration award.

Should the McCracken Circuit Court find that Indiana has obligations under the bond to any or all of the subcontractors, then, to the extent those awards were paid out by Paducah from the drawn-down funds in the registry of the Court, the drawn-down funds would not have satisfied the amounts which the arbitration panel awarded as between Paducah and Indiana. The Court here notes and emphasizes that its confirmation of the arbitration award operates only to fix the amounts due as between those two parties, and does not in any way adjudicate claims raised by creditor subcontractors under Kentucky law and in a Kentucky court.

On the other hand, should the McCracken Circuit Court find that none of the creditor subcontractors have valid claims against Indiana and that the drawn-down funds were properly paid to Paducah in satisfaction of the claim *raised in that Court by Paducah* that it was due the funds in satisfaction of the arbitration award, this Court would find the award satisfied. There are, of course, other possible resolutions of the dispute over the interpled funds which this Court can neither anticipate nor could it speak to at this time. Suffice it to say that the determination of the discharge of the judgment and any order of execution by this Court must await the determination of the claims and rights of the parties in the *Cole Lumber* action.

The defendant Indiana has argued in its reply memo that under Kentucky law none of the subcontractors may sue as third-party beneficiaries to the particular type of bond at issue. That is not a question which is properly

before this Court. The Kentucky Court must properly answer that question, and this Court would be most presumptive to hazard any opinion upon that point of law.

CONCLUSION

The award in the arbitration between Paducah and Indiana is confirmed pursuant to 9 U.S.C. § 9.

The defendant's motion for summary judgment as to the plaintiff's claims for amendment of the amount of the award is granted, and the plaintiff's cross-motion for summary judgment on that same issue is denied.

The plaintiff's motion for summary judgment as to the defendant's counterclaim seeking to amend ¶ 7 of the award is granted, and the defendant's counterclaim is dismissed.

The parties may submit a judgment consistent with this memo. Execution upon any judgment will be stayed, however, pending the resolution of claims in *Cole Lumber & Supply Co., Inc. v. McBride*, Civil Action No. 14,876, McCracken Circuit Court, Kentucky.

/s/ Timothy Morgan
United States District Judge

APPENDIX D

79-3157

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PADUCAH ASSOCIATES, LTD.,
Plaintiff-Appellant,

v.

INDIANA INSURANCE COMPANY and ALL PRIDE DEVELOPMENT CORPORATION,
Defendants-Appellees.

ORDER

(Filed December 15, 1980)

Before: LIVELY and ENGEL, Circuit Judges and PECK, Senior Circuit Judge

Appellant having filed a petition for rehearing with this court, and this court having considered said petition and being duly advised in the premises,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX E

STATUTORY PROVISIONS AND RULE OF CIVIL PROCEDURE INVOLVED

9 U.S.C.

§ 3. Stay of Proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within

which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Federal Rules of Civil Procedure

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without

supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action

as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of

delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.